United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

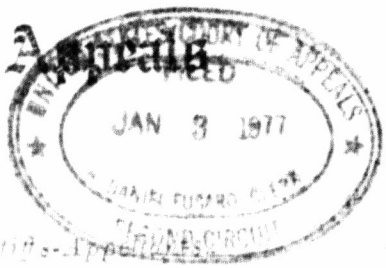
ORIGINAL **76-7420**

To be argued by
PEYTON H MOSS

IN THE

United States Court of Appeals

For the Second Circuit



SOLOMON CATES, *et al.*,
Plaintiffs-Appellees,

against

TRANS WORLD AIRLINES, INC., *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR DEFENDANT-APPELLEE TRANS WORLD AIRLINES, INC.

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NOTE

The following citation abbreviations are used herein:

"(A	)"	Appendix
"(A.Br.	)"	Appellants' Brief
"(Mem. II	)"	Memorandum of the District Court, July 22, 1972, dismissing the Second Amended Complaint
"(SAC	)"	Second Amended Complaint
"(EEOC Br.	)"	Brief of Equal Employment Opportunity Commission, *amicus curiae*

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BRIEF FOR DEFENDANT-APPELLEE TRANS WORLD AIRLINES, INC.

Preliminary Statement

This is an appeal by plaintiffs Solomon Cates, Jonathan George, and James Whitehead, Jr. ("plaintiffs" or "Cates," "George," and "Whitehead," respectively), from an order of the United States District Court for the Southern District of New York (Brieant, J.), entered July 22, 1976, which, on motions by defendants Trans World Airlines, Inc. ("TWA") and Airline Pilots Association ("ALPA"), dismissed plaintiffs' Second Amended Complaint in its entirety without right of further amendment (A 1, 36, 37).

Basically, the Second Amended Complaint sought to state a cause of action under Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e *et seq.*; "Title VII"), Section 1 of the Civil Rights Act of 1866 (42 U.S.C. §1981; "Section 1981"), and the Railway Labor Act (45 U.S.C. §§152, 181, 182; "RLA") which would procure for plaintiffs—three black TWA pilots—and a purported class of all other black TWA pilots or would-be black pilots—certain declaratory, injunctive, and other relief from defendants' alleged discriminatory actions against plaintiffs and the purported class in (1) failing to hire blacks as pilots because of their race and (2) in applying to those black pilots TWA did hire the provisions of the facially neutral date-of-hire seniority system contained in the TWA-ALPA collective bargaining agreement covering all TWA pilots of whatever race or color (see SAC ¶1-3, 9-10; A 27-29, 31-36).

Plaintiffs alleged that the specifics of the charged violations were set out in paragraphs 4, 5, 6, 9, and 10 of the Second Amended Complaint as follows (see SAC ¶2; A 28)*:

Since it began doing business TWA has refused to hire blacks as pilots because of their race [SAC ¶9(a); A 32]. Because of that policy, TWA refused to hire plaintiffs Cates and George when they first applied to be pilots in 1966 (SAC ¶4, 5; A 29-30). Because he knew of that policy, plaintiff Whitehead, an Air Force pilot in 1957 who wished to fly for TWA, was dissuaded from applying to TWA for hire as a pilot until 1966, at which time he applied and was hired (SAC ¶6; A 30). Both Cates and George were hired as TWA pilots in 1969 (SAC ¶4, 5; A 29-30).

* Since for purposes of a motion to dismiss a complaint's factual allegations are deemed to be true, although conclusory allegations of violations are irrelevant except to the extent that they allege facts as a basis for the complaint [see *Avins* v. *Mangum*, 450 F.2d 932, 933 (2d Cir. 1971); *Murray* v. *City of Milford*, 380 F.2d 468, 470 (2d Cir. 1967)], TWA will state plaintiffs' allegations as *facts* although it categorically denies that plaintiffs Cates and George were qualified for the position sought at the time their respective applications were rejected and further denies that it rejected them, Whitehead, or any other applicant because of their race.

At the time of their respective hires, all three plaintiffs were—like all new hires regardless of race or color—given seniority as of their actual date of hire in the TWA-ALPA date-of-hire seniority system [SAC ¶9(c), (d); A 32-33]. This date-of-hire seniority system effectively governs each pilot's job assignments, compensation, eligibility for transfer or promotion, liability to furlough, and order of recall throughout each pilot's employment with TWA [SAC ¶9 (c); A 32-33].* Application of this seniority system to plaintiffs and other black pilots affects them adversely if, through previous unlawful refusal to hire them, they do not have their rightful place in the system [SAC ¶2, 9(d); A 27-28, 33].

In September 1970 plaintiff Cates was furloughed in accordance with his seniority on TWA's pilot seniority list (SAC ¶4; A 29). In October 1970 plaintiff George was similarly furloughed (SAC ¶5; A 30). Neither Cates nor George has since been recalled (SAC ¶4, 5; A 29, 30). Plaintiff Whitehead has never been furloughed and is still on duty as a TWA pilot (SAC ¶6; A 30).

On March 24, 1972, all three plaintiffs filed charges with the EEOC claiming that TWA had discriminated against them and other blacks by refusing to hire them as pilots and by applying to them, when they were eventually hired, TWA's date-of-hire seniority system which affected them adversely and discriminatorily in almost all aspects of their employment, including their vulnerability to furlough, because their place in the seniority system was less advantageous than it would have been had TWA hired them at an earlier date [see SAC ¶4, 5, 6, 9(c), (d); A 29-33].

The Second Amended Complaint acknowledges that in January 1970 TWA, as an economy measure, suspended all pilot hiring [SAC ¶9(f); A 34].

For relief, plaintiffs sought, among other things, a declaratory judgment that the acts complained of violate Title

* Furlough is the airline industry's term for layoff.

VII and Section 1981, an injunction enjoining defendants from continuing those acts and requiring affirmative action to redress the continuing effects thereof, and all back pay to which plaintiffs and members of the alleged class may be entitled (SAC ¶11, A 34-35).*

The Motions to Dismiss

Upon the filing of the Second Amended Complaint (hereinafter "the complaint") defendant TWA moved to dismiss on the grounds (1) that the Title VII and Section 1981 claims were untimely because no charge had been filed with the Equal Opportunity Commission ("EEOC") nor a Section 1981 action started with respect thereto within the periods of limitations applicable to such charges or actions (Mem. II; A 41-42) and (2) that a *bona fide* seniority system operating on a "last-in, first-out" basis does not violate Title VII by perpetuating the effects of past discrimination (Mem. II; A 37).**

With respect to plaintiffs' contentions that TWA refused to hire them and other blacks as pilots because of their race,

* This action was commenced by the filing of the original complaint herein on December 23, 1973 (see A. Br. 3). Between that date and December 15, 1975 (see A 27) various events took place which led to the filing of the Second Amended Complaint which was the subject of the motions to dismiss here involved. Since defendant TWA considers that the entire issue here presented is encompassed in the allegations of that Second Amended Complaint and the District Court's ruling thereon, TWA considers the intervening events irrelevant. However, if the Court thinks otherwise, the events are briefly summarized in the District Court's opinion below (see Mem. II; A 37-39, 42-43; see also Stipulation and Letter Agreement; A 23-26).

The parties agreed that the Second Amended Complaint would omit all claims of "current discrimination" except insofar as plaintiffs claim that application of TWA's date-of-hire seniority system perpetuates the alleged prior unlawful refusals to hire those blacks as pilots or itself constitutes present discrimination (see Stipulation and Letter Agreement; A 23-26; see Mem. II; A 38; but see pp. 2-3, above).

** Defendant ALPA also moved to dismiss on the ground that the complaint failed to state a claim upon which relief could be granted, directed principally to the timeliness issue and the lack of legal substance to the "duty of fair representation" claim.

TWA relied principally upon the facts that (1) plaintiffs' EEOC charges about TWA's alleged unlawful refusal to hire plaintiffs and other blacks as pilots had not been filed until March 24, 1972, although the longest possible Title VII period of limitations was 300 days and the last plaintiff hired, Cates, had been hired in October 1969, (2) an unlawful refusal to hire could not be a "continuing violation" after the rejected applicant was hired, and (3) TWA had, for economic reasons, stopped all pilot hirings in January 1970 [SAC ¶9(f); A 34; see Mem. II; A 37, 44-46]. Similarly, plaintiffs' Section 1981 action was not filed until December 23, 1973, more than the applicable 3-year limitation period after those same acts (see A.Br. 3).

With respect to plaintiffs' contention that the application of TWA's neutral date-of-hire seniority system to them constituted actionable discrimination because plaintiffs' inferior place in the system perpetuated the effects of the prior unlawful refusal to hire, TWA contended (1) that the only possibly discriminatory act could be the *assignment* of the seniority place upon hire, (2) that since no EEOC charges or Section 1981 action had been filed within the respective limitations periods after such assignment plaintiffs' "seniority claims" were also barred, and (3) that any other result would destroy the applicable statutes of limitations and give rejected and then hired persons unlimited time to sue while restricting rejected but never hired persons to the statutory period (see Mem. II; A 47-48).

Plaintiffs, on the other hand, asserted (1) that an unlawful refusal to hire was a "continuing violation," (2) that TWA's suspension of all pilot hiring did not establish that it had abandoned its policy of refusing to hire blacks as pilots, which policy was in fact continuing and thereby actionable, and (3) that, in any event, the adverse effect of plaintiffs' "wrongful place" in TWA's seniority system either (i) perpetuated throughout plaintiffs' employment the prior unlawful refusal to hire, thus making it actionable at any time, *or* (ii) itself constituted a new continuing discrimination in violation of Title VII and Section 1981 (Mem. II; A 48).

The District Court's Decision

In July 1976, the District Court granted defendants' motions and dismissed the complaint in its entirety (Mem. II; A 67). In deciding the issues presented, Judge Brieant divided his opinion into three distinct parts:—(1) the Title VII claims; (2) the §1981 claims, (3) the duty of fair representation claims (see Mem. II; A 43, 44, 46, 61, 62).

The Title VII claims, clearly the most difficult to resolve, he subdivided into two parts which he concluded represented the "*two distinct unlawful employment practices*" alleged by plaintiffs in the complaint (Mem. II; A 43; emphasis supplied). The first "distinct unlawful employment practice" he identified was "a refusal to hire plaintiffs and the class they seek to represent because of race"—which he called "the refusal to hire claim" (Mem. II; A 43-44). The second "distinct unlawful employment practice" he identified was "the application of a facially neutral, date-of-hire seniority system to all [pilot] members, including plaintiffs and all other similarly situated [black TWA pilots] which, by making blacks more exposed to layoffs than whites, has the effect of carrying forward TWA's past discriminatory hiring practices, *now abandoned*, into the present"—which he called "the seniority claim" (Mem. II; A 44; emphasis supplied).

a. The Title VII "refusal to hire claim"

With respect to all three plaintiffs, the District Court held that their claims of unlawful refusal to hire them (or discouraging them from applying for hire) because of their race were untimely because charges with respect thereto had not been filed with the EEOC within 180 days following their actual hire (Mem. II; A 44-46).*

* Query whether 90 days was not in fact the period applicable to plaintiffs in 1969 when they were hired and the alleged prior unlawful refusal to hire ended [see 78 Stat. 241 (1964), §706(d); but *cf. I.U.E.* v. *Robbins & Myers, Inc.*, —— U.S. ——, 35 USLW 4068, 4071 (Dec. 20, 1976) (1972 180-day amendment retroactive to late 90-day charge).

With respect to their claim that TWA had a continuing policy of refusing to hire blacks as pilots which made their EEOC charges timely, the District Court held that since TWA had, for economic reasons, suspended all pilot hiring in January 1970, more than two years before the charges were filed, there could not have been any unlawful refusal to hire after that date and thus plaintiffs' refusal to hire claim on behalf of the purported class was also untimely (Mem. II; A 45-46).

The District Court specifically rejected plaintiffs' theory that the alleged refusal to hire constituted "continuing violations" (Mem. II; A 45-46).

b. The Title VII "seniority claim"

With respect to Cates and George, the District Court held—on the alleged authority of *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976), and *Acha* v. *Beame*, 531 F.2d 648 (2d Cir. 1976)—that if they could show that but for TWA's past unlawful refusal to hire them they would have accumulated sufficient seniority to withstand their furloughs they would have alleged an actionable unlawful employment practice (Mem. II; A 46-47). However, the court went on to hold that their alleged "wrongful place" in the seniority system did not damage them sufficiently to support an action until they were "laid off" and since Cates and George had not filed their EEOC charges until more than 180 days after their respective furloughs their seniority claims were untimely (Mem. II; A 46-47, 54-58).

With respect to Whitehead, the District Court held that since he had not been furloughed his "seniority claim" was premature (Mem. II; A 58-61). In so deciding, the District Court explicitly held that the monthly loss of "seniority benefits such as promotion, choice of flight duty, route assignments, and equipment flown" resulting from his allegedly "wrongful place" in the seniority system are not "in and of themselves fresh acts of discrimination but are only the derivative effects of the prior policies [*i.e.*, the alleged

unlawful refusal to hire] as carried over by the seniority system" (Mem. II; A 59, 60-61). Since Whitehead failed to challenge those "prior policies" within the statutory period after his hire and "since he has never been laid off" the District Court concluded that he cannot now litigate his "seniority claim" (Mem. II; A 61).

c. The "§1981 claims"

In light of *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975), the District Court withdrew its former opinion that filing an EEOC charge tolled the Section 1981 statute of limitations and held that, since the original complaint herein was not filed until more than three years "after the §1981 cause of action accrued," the Section 1981 claims were also time-barred (Mem. II; A 61-62: George furloughed October 1970; complaint filed December 1973; A 30; A. Br. 3).

d. The "duty of fair representation claims"

With respect to these claims made against TWA as well as ALPA, the District Court held that TWA, the employer, owed plaintiffs as TWA employees no duty of fair representation in these circumstances (Mem. II, A 62-64). As for ALPA, the court held that it had not violated its duty of fair representation by negotiating and continuing in effect a date-of-hire seniority system (Mem. II; A 64-66).*

Because defendants feel that the legal effect of the application of a facially neutral, date-of-hire seniority system

* In order to minimize the duplicative material pressed upon this Court in appeals involving more than one party on a side, defendants TWA and ALPA have divided between them the briefing of some of the issues as separated by the District Court. Accordingly, while TWA and ALPA will present their own views on the Title VII claims, TWA in this brief will present both defendants' views on the §1981 claims and ALPA will present in its brief both defendants' views on the duty of fair representation claims. We here wish to emphasize only that the District Court correctly held that TWA, the employer, has *no* "duty of fair representation" of its employees [*Glus* v. *G.C. Murphy Co.*, 329 F.Supp. 563 (W.D. Pa. 1971); see Mem. II; A 63].

to minority groups is perhaps the most controversial and hotly-contested discrimination issue of the day and the issue on this appeal in which this Court will have the liveliest interest, TWA will devote the major part of the remainder of this brief to analyzing the District Court's resolution of "the seniority claim" and reconciling the dismissal conclusion which defendants both wholeheartedly support with the controlling decisions on that issue. In pursuance of that objective, TWA will, accordingly, deal only briefly with the "the refusal to hire issue" and the "§1981 issue", both of which involve simpler and better established concepts than "the seniority issue."

TWA's Position on the Title VII and Section 1981 Claims

It is defendant TWA's position that the dismissal of those claims was correct. However, TWA respectfully disagrees with the District Court's reasoning and conclusions with respect to what it called plaintiffs' respective "seniority claims" (see Mem. II; A 46-61) and urges this Court to uphold the dismissal of those claims on the grounds set forth at pages 15-43, below.

ARGUMENT

I

Plaintiffs' Title VII "refusal to hire claims" do not constitute continuing violations of Title VII to which Title VII's statute of limitations is inapplicable [answering Appellants' Brief, pp. 13-14, 25-26].

Section 2000e-5(d) of Title VII of the Civil Rights Act of 1964, as amended on the date plaintiffs filed their charges with the EEOC (March 24, 1972), requires that charges must be filed with the EEOC "within one hundred and eighty days after the alleged unlawful employment practice occurred * * *" [42 U.S.C. §2000e-5(d); but see footnote, page 6, above]. The failure of a plaintiff to file a

timely charge with the EEOC is a jurisdictional bar to a private suit under Title VII [see, *e.g., McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 798 (1973); *Collins* v. *United Air Lines, Inc.,* 514 F.2d 594, 596 (9th Cir. 1975); *Bowe* v. *Colgate Palmolive Co.,* 416 F.2d 711, 719 (7th Cir. 1969); Mem. II; A 43].

It appears also to be settled law that, ordinarily, a refusal to hire is not a continuing violation and must be complained of within the applicable statutory period [see, *e.g., Smith* v. *Office of Economic Opportunity for the State of Arkansas,* —— F.2d ——, 13 FEP Cases 131 (8th Cir. 1976); *Molybdenum Corp.* v. *EEOC,* 457 F.2d 935 (10th Cir. 1972)] although it may be considered as a continuing violation where the refusal is part of a policy or practice which is being implemented within the period of limitations [see *Kohn* v. *Royall, Koegel & Wells,* 59 F.R.D. 515, 518 (S.D.N.Y. 1973), *app. dismissed* 496 F.2d 1094 (2d Cir. 1974); *Jamison* v. *Olga Coal Co.,* 335 F. Supp. 454, 458 (S.D.W.Va. 1971); Mem. II; A 45-46].*

However, here, all three plaintiffs were hired and TWA ceased all pilot hiring in January 1970 (see pages 2, 3, above). Clearly, TWA's refusals to hire Whitehead, Cates, and George *must* have ended at the latest on their respective dates of hire—Cates, the last one, having been hired on October 17, 1969 (see page 2, above). Since plaintiffs' EEOC charges were not filed until March 24, 1972, over two years after Cates was hired, those charges are untimely (see page 3, above; Mem. II; A 44-46).

Furthermore, any "refusals to hire" either plaintiffs or members of their purported class based upon an alleged continuing TWA policy not to hire blacks *must* have ended when TWA, for economic reasons, ceased all pilot hiring in January 1970 (see page 3, above; Mem. II; A 45, 46). Since

* The conclusion in the *Kohn* case, *supra,* 59 F.R.D. 515, 518 (S.D.N.Y. 1973), that the failure to hire Kohn was a "continuing violation" is not relevant here since Kohn was never hired and here all the plaintiffs were (see also 59 F.R.D. at 523).

plaintiffs' EEOC charges were not filed until more than two years later, they are clearly untimely and plaintiffs cannot maintain their action under Title VII alleging unlawful refusals to hire (see Mem. II; A 46).

Plaintiffs' argument that the fact that TWA suspended all pilot hiring in January 1970 and has hired no pilot since does not constitute an abandonment of its alleged discriminatory policy of refusing to hire blacks as pilots (see A.Br. 13-14, 25-26) is without merit. Title VII makes it an unlawful employment practice for an employer "to fail or refuse to hire * * * any individual * * * because of such individual's race, color, religion, sex or national origin" [42 U.S.C. §2000e-2(a)]. Since January 1970 TWA has, for economic reasons, hired no pilots—regardless of race, color, or any other prohibited criteria (see page 3, above; Mem. II; A 46). To argue that stopping *all* pilot hiring does not terminate the alleged discriminatory hiring policy or practice is devoid of logic.

To discriminate in hiring requires an employer to treat one applicant differently from another. An employer who, for entirely permissible reasons, is not hiring anyone cannot be discriminating in hiring; and one who has not hired anyone for more than two years prior to the date of an unlawful refusal to hire charge with the EEOC cannot have discriminated in hiring within the period of limitations here involved [see Mem. II; A 46; *Smith* v. *Office of Economic Opportunity for the State of Arkansas, supra,* —— F.2d ——, 13 FEP Cases 131, ftnote 1; *Powell* v. *Southwestern Bell Telephone Co.*, 494 F.2d 485, 489 (5th Cir. 1974) (failure to hire anyone in limitations period bars claim of refusal to hire because of age); *NLRB* v. *Houston Maritime Association*, 426 F.2d 584 (5th Cir. 1970) (suspension of registering *any* stevedores for more than 6-month NLRA limitations period bars unfair labor practice charge of prior refusal to register blacks)].

Accordingly, plaintiffs' "refusal to hire claims" for themselves and the members of their purported class are untimely and the Title VII action based thereon must be dismissed (Mem. II; A 46).*

II

Plaintiffs' Section 1981 claims are also time-barred [answering Appellants' Brief, pp. 27-29].

If defendants and the District Court are correct that plaintiffs' Title VII "refusal to hire claims" are not continuing violations of Title VII and thus must be dismissed because their EEOC charges based thereon were not filed within the statutory period (see Point I, pages 9-12, above), then for the same reasons their Section 1981 claims are similarly barred (see Mem. II; A 62). As plaintiffs concede in their brief (see A.Br. 27), this Court has repeatedly held that the statute of limitations applicable to Section 1981 actions in New York is the 3-year period specified in the New York Civil Practice Law and Rules §214(2) [see, *e.g., Kaiser* v. *Cahn,* 510 F.2d 282 (2d Cir. 1974); *Romer* v. *Leary,* 425 F.2d 186 (2d Cir. 1970)]. Since the last plaintiff hired was Cates and he was hired in 1969, plaintiffs' Section 1981 action begun December 23, 1973, is clearly untimely (see page 2, above; A.Br. 3; Mem. II; A 62).**

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* Plaintiffs' argument that if their refusal to hire claim is not barred they believe they have *prima facie* evidence of past discrimination (see A. Br. 25-26) is irrelevant to a determination as to timeliness. Most, if not all, barred claims can make the same appeal. Their further argument that when and if TWA resumes hiring it may again discriminate is disingenuous (see A. Br. 26). Should it do so, a "fresh discrimination" will then arise and be actionable.

** The Section 1981 claims would also be untimely even if one accepted the District Court's view that George's "layoff" was the last specific actionable event, since George was furloughed in October 1970 and this action was begun on December 23, 1973 (see page 3, above; A. Br. 3). Only if either the "refusal to hire claims" or the "seniority claims" are held by this Court to constitute "continuing violations" so as to permit any of the plaintiffs to maintain an action thereon can their Section 1981 claims be considered timely.

In deciding defendants' first motions to dismiss, the District Court held that filing a charge with the EEOC tolled Section 1981's statute of limitations (see Mem. II; A 62). However, the Supreme Court in *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975), held that even timely charges filed with the EEOC do not toll Section 1981's statute. It can only follow, *a fortiori*, that plaintiffs' *untimely* charges cannot toll it either.

Plaintiffs, however, argue that the *Johnson* decision in 1975 should not be applied "retroactively" to dismiss plaintiffs' action originally filed in December 1973 (see A. Br. 28-29). They base this argument on the Supreme Court's decision in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971) and three decisions in the Fifth Circuit—*Hambrick* v. *Royal Sonesta Hotel*, 403 F. Supp. 943 (E.D. La. 1975), *Bush* v. *Wood Bros. Transfer Co.*, 398 F. Supp. 1030 (S.D. Texas 1975), and *Villareal* v. *Braswell Motor Freight Lines, Inc.*, —— F. Supp. ——, 11 FEP Cases 831 (S.D. Texas 1975). However, plaintiffs' reliance on these cases is misplaced.

In the first place, the *Johnson* case itself was applied "retroactively" in the sense that it deprived the plaintiff, Johnson, of any Section 1981 claim in 1975 even though he had filed his EEOC charge in 1967, even though his failure to file a timely Section 1981 claim "may have been induced by faith in the adequacy of his Title VII remedy," and even though the Supreme Court specifically expressed its awareness that his "Title VII court action now also appears to be time-barred" (see 421 U.S. at 466). Had the Supreme Court considered retroactivity of its *Johnson* decision to be inappropriate, it was well aware of how to accord it prospective effect only (see *Chevron Oil Co.* v. *Huson, supra*, 404 U.S. 97, 105-109). Its failure to do so should be determinative here.

Secondly, there is no evidence that plaintiffs had any knowledge of or relied in any way upon any previous de-

cisions that a *timely* EEOC charge tolled the Section 1981 statute of limitations—a conclusion underscored by the fact that plaintiffs' EEOC charges of unlawful refusal to hire were themselves untimely by at least two and one-half years (see pages 9-11, above). Had plaintiffs even been considering the statutes of limitations they never would have been so tardy in asserting even their Title VII claims let alone their Section 1981 actions which they could have brought at any time from at least 1966 on (see 421 U.S. at 466). Thus, as the Supreme Court said in *Johnson*, in a very real sense, plaintiffs "slept on [their] Section 1981 rights" (*ibid.*).

Finally, insofar as plaintiffs' District Court cases from the Fifth Circuit (see *Hambrick*, *Bush*, and *Villareal*, all *supra* at page 13, above) denied retroactivity to *Johnson*, they may perhaps be justified by the fact that that Circuit was one in which its own Court of Appeals had previously enunciated the tolling theory [see *Boudreaux* v. *Baton Rouge Marine Contracting Co.*, 437 F.2d 1011, 1017, ftnote 16 (5th Cir. 1971)]. Be that as it may, in October 1975, the Court of Appeals for the Fifth Circuit itself expressly applied *Johnson* to bar a Section 1981 suit despite a pending Title VII charge [see *Dupree* v. *Hutchins Bros.*, —— F.2d ——, 12 FEP Cases 1741 (5th Cir. 1975); see accord, *Flores* v. *Dun & Bradstreet, Inc.*, —— F. Supp. ——, 12 FEP Cases 149, 149-150 (S.D.N.Y. 1975); *Franklin* v. *Crosby Type Co. & Int'l Typo. Union*, 411 F. Supp. 1167, 1170 (N.D. Texas 1976); *Patterson* v. *American Tobacco Co.*, —— F.2d ——, 12 FEP Cases 314, 328 (4th Cir. 1976) (*semble*)].*

Under *Johnson*, plaintiffs' untimely EEOC charge could not toll Section 1981's 3-year limitations period. Ac-

* *De Matteis* v. *Eastman Kodak*, 520 F.2d 409, 410-411 (2d Cir. 1975) is clearly distinguishable as it was designed to apply only to persons who had been individually misled by precise, but improper, directions as to timeliness by the EEOC itself and had demonstrably relied, to their detriment, thereon [*ibid.*; see also *De Matteis* v. *Eastman Kodak*, Civ. 1973/478 (W.D.N.Y., Feb. 27, 1976) (on remand)].

cordingly, plaintiffs' Section 1981 "refusal to hire claims," like their Title VII ones, are untimely and must be dismissed.

III

Plaintiffs' Title VII "seniority claims" do not constitute continuing violations of Title VII to which Title VII's statute of limitations is inapplicable [answering Appellants' Brief, pp. 14-25].

a. Introduction

Before adequate analysis or argument with respect to this issue and the District Court's resolution thereof can be undertaken, this Court should have clearly in mind the basic positions of plaintiffs, defendant TWA, and the District Court thereon.

i. Plaintiffs' position

Plaintiffs contend as follows: they were at some time in the past refused hire (or discouraged from applying for hire) as TWA pilots because of their race. When they were eventually hired they got a less advantageous place in TWA's date-of-hire seniority system because they were hired later than they should have been. This disadvantageous place in the seniority system has had an adverse effect upon their careers every day since it was assigned to them by affecting their choice of domicile, the flights they can bid, the equipment they can qualify to fly, their compensation, their promotion, their safety from furlough, their place on the recall list. For Cates and George, plaintiffs allege that their allegedly "wrongful place" in the seniority system caused their furlough; for Whitehead, plaintiffs allege that the above-described adverse effects of his allegedly "wrongful place" have damaged his career from the outset and are still damaging it—short of furlough.

From the above, plaintiffs conclude that, pursuant to *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976),

Acha v. *Beame*, 531 F.2d 648 (2d Cir. 1976), *Evans* v. *United Air Lines, Inc.*, 534 F.2d 1247 (7th Cir. 1976), and various other authorities, the application to plaintiffs of TWA's date-of-hire seniority system either (1) "perpetuates" TWA's prior unlawful refusal to hire plaintiffs when it should have so as to make that prior unlawful refusal to hire a "continuing violation" of Title VII litigable *at any time*—previously, now, or later—*or* (2) itself constitutes, every day of plaintiffs' employment, a "continuing violation" of Title VII similarly litigable *at any time*. They concede that their position, if accepted, renders Title VII's statute of limitations "inapplicable" to them (see A.Br., Statement of Point I and pp. 13-25, *passim*).

ii. TWA's position

TWA contends as follows: TWA's date-of-hire system is neutral and non-discriminatory in every respect. Implicitly if not explicitly plaintiffs concede that fact (see A.Br. 6, 14). Upon their hire, plaintiffs—like every other TWA pilot of whatever race or color—were assigned their date-of-hire place in that neutral nondiscriminatory system. Thereafter, TWA has applied the provisions of its collective bargaining agreement embodying that seniority system to plaintiffs—just as to every other TWA pilot of whatever race or color—in a completely neutral and nondiscriminatory fashion, including the furloughing of plaintiffs Cates and George and the non-furloughing of plaintiff Whitehead in accordance with their respective seniority places in the date-of-hire seniority system.

If plaintiffs have any claim of discrimination against TWA it is the claim that, because of their race, TWA did not hire them at some time prior to their actual date of hire and that this alleged prior unlawful refusal to hire caused each of them to be assigned a wrongfully belated place in the seniority system so that routine application of that system to them will not be as advantageous to them in the future as it would be if they had entered the system earlier as they claim they should have.

From the above, TWA concludes that plaintiffs' only possible claims of discrimination are the alleged prior unlawful refusals to hire them (which *must* have ended on their actual date of hire) and the act of using their respective actual date of hire as the basis for the assignment of their place in the neutral date-of-hire seniority system instead of some earlier date when plaintiffs contend they should have been hired (which act *must* have been completed at the time of the assignment of seniority dates to plaintiffs). Since plaintiffs obviously knew at the time of their hire that TWA had previously unlawfully refused to hire them and thus also knew that they were being assigned an allegedly "wrongful place" in the seniority system which would disadvantage them daily for the rest of their employment, the discrimination, if any, was complete upon that date and plaintiffs had the statutory periods of limitations —180 days under Title VII or three years under Section 1981—to file an EEOC charge or bring a Section 1981 action with respect thereto or be forever barred therefrom. Nothing that has happened to them thereafter by applying the neutral seniority system to them as to any other TWA pilots has been discriminatory in any way.

Requiring plaintiffs—or any other persons in similar circumstances—to challenge the legal correctness of their place in a neutral date-of-hire seniority system within the applicable period of limitations following the assignment of that place has the following logical, desirable, and practical effects:

(1) it fixes a definite time within which claims of prior unlawful refusal to hire and "wrongful place" challenges must be made and requires plaintiffs to raise and litigate such claims when the facts are fresh and the evidence available;

(2) in so doing it applies, rather than avoids, the Title VII statute of limitations which Congress enacted for that very purpose;

(3) it settles a plaintiff's place in the seniority system at the outset of his employment and thus ensures the stability of that seniority system upon which the plaintiff and his fellow employees rely in projecting their future employment opportunities and liabilities;

(4) it prevents employers from being constantly subject to liability of unknown, and indeed unknowable, extent resulting from future claims for damages caused by allegedly unlawful placement in seniority systems, which claims—under plaintiffs' theory—may remain latent but alive throughout the claimant's employment, subject to assertion or non-assertion at the claimant's whim;

(5) it avoids the illogical and undesirable result of according to unlawfully rejected applicants who are later hired more rights to remedy the unlawful rejection than it accords to unlawfully rejected applicants who are never hired; and

(6) it protects the integrity of *bona fide* seniority systems as Congress intended while permitting plaintiffs ample opportunity to obtain their "rightful place" in such systems with the least possible interference therewith.

iii. The District Court's position

The District Court's position appears to be as follows:

The defendants' position that plaintiffs' "[wrongful place] seniority claim" arose and was completed at the time the seniority was awarded and must be brought within the applicable statutory period thereafter is unacceptable because it would encourage premature charges to the EEOC before any new employee knew what wrong the

employer had done him or what, if any, damage he would suffer (see Mem. II; A 47-49).*

But the plaintiffs' position that their "[wrongful place] seniority claim" does not accrue at any particular point in time but is "continuing in nature" so as to be always available for assertion and prosecution is equally unacceptable because it would permit the litigation of ancient "refusals to hire claims" in violation of the "basic policy" of processing only "fresh discriminatory acts", would "eradicate" the statute of limitations for anyone who at any time chooses to claim that he was hired later than he should have been, and would, illogically, accord rejected but later hired persons greater rights than less fortunate persons who were also rejected but never hired by allowing the former "to bring their claims to the EEOC *any time they chose*" while restricting the latter to the statutory limitation periods (see Mem. II; A 48, 52-54; emphasis supplied). Furthermore, the injuries daily suffered from a "wrongful place" in a date-of-hire seniority system "*are not in and of themselves fresh acts of discrimination*, but are only the derivative effects of the prior polici arried forward by the seniority system" and thus do not constitute "the unlawful *act* or *practice*" which alone is actionable (see Mem. II; A 59-61, *cf.* 54; emphasis supplied).

From this rejection of both defendants' and plaintiffs' positions, the District Court concluded that, having failed to challenge TWA's alleged unlawful "refusal to hire" them within the period of limitations following their hire, plaintiffs suffered no actionable discrimination unless and

* This reasoning is patently faulty since, clearly, a "wrongful place" claim can only be based on an employee's assertion that his employer unlawfully refused to hire (or promote or transfer) him earlier so that he deserves an earlier place in the system—both of which facts he obviously must know at the time of his hire and the assignment of his seniority. Equally, at the same time, a "wrongful place" claimant knows that his allegedly wrongful place in the system will adversely affect his entire future employment—including his liability to layoff and priority in recall—and that the only satisfactory remedy is attainment of his "rightful place" at the earliest opportunity.

until they were laid off (Mem. II; A 54-55); that *Acha* v. *Beame, supra,* and *Franks* v. *Bowman, supra,* hold that a layoff according to a neutral, date-of-hire seniority system may be "an unlawful employment practice" under Title VII if a plaintiff can show that but for past discrimination he would have been hired early enough to accumulate sufficient seniority to withstand the layoff; but that since Cates and George had not filed any charges raising their "seniority claims" within the period of limitations after their "layoffs," their claims are time-barred; and that since Whitehead has never been furloughed no "seniority claim" has yet arisen as to him and his "seniority claim" had to be dismissed as premature (see Mem. II; A 46-47, 58-61).

The District Court "chose" layoff as the discrimination date because it is the point at which the affected employee "feels most aggrieved" and because it will "promote the prompt adjudication of the [seniority] rights of all workers, including those workers who will necessarily be adversely affected by an award of constructive seniority to others", by encouraging "those who seek to rearrange the seniority lists * * * to bring their actions promptly, in order to resolve the difficult issue of constructive seniority in an expeditious manner" (see Mem. II; A 56-58).*

b. Present judicial authority supports TWA's position.

In reaching its compromise conclusion somewhere between the positions which plaintiffs and defendants had espoused before it, the District Court relied principally upon *Franks* v. *Bowman, supra,* 424 U.S. 747; *Acha* v. *Beame, supra,* 531 F.2d 648; and *Collins* v. *United Air Lines, Inc.,* 514 F.2d 594 (9th Cir. 1975). TWA submits, however, that in so doing the District Court misinterpreted *Franks*

* The District Court ignored the fact that adoption of defendants' position that the date of assignment of the seniority place is the discriminatory act (if any exists with respect to actions taken under a neutral date-of-hire seniority system) would resolve all questions of "constructive seniority" at the earliest possible date, without the trauma of challenged layoffs and with obvious benefit to all employees and to the employer and the Union as well.

and stretched it to hold that a layoff pursuant to a neutral, date-of-hire seniority system could itself constitute a violation of Title VII regardless of Title VII's statute of limitations and applied *Acha*, decided before *Franks*, as holding to the same effect although the issue here presented was not before this Court in that case and although all prior decisions with respect to neutral seniority systems and "wrongful place" litigation must now be reevaluated in the light of *Franks*.

It is TWA's contention that *Franks*, rightly interpreted, supports TWA's position in this action, that *Acha* does not hold to the contrary when applied to the facts of this case, and that other relevant and persuasive authority as well as logic, practicality, and good public policy require the affirmance of the dismissal below on the basis of TWA's position outlined at pages 16-18, above.

i. Franks *v.* Bowman

Franks v. *Bowman*, *supra*, 424 U.S. 747, involved a class action charging an employer with *present* racial discrimination in that the employer was *at the time of suit* not permitting blacks to be hired, or to transfer with their company seniority, into departments theretofore reserved to whites [see *Franks* below, 495 F.2d 398, 410-411 (5th Cir. 1974)]. The present discrimination having been proved, the Court of Appeals had already required the employer to allow all present employees to transfer with all their seniority, had awarded back pay to remedy the company's prior refusals to allow the hire and transfer of blacks, but had refused to require the company to give the excluded blacks seniority as of their date of application for hire on the ground that Section 703(h) of Title VII prohibited such "constructive seniority" (424 U.S. at 757; see also *Franks* below, 495 F.2d at 414-418, 421-423).

The only substantive question brought to the Supreme Court was whether persons who had been discriminatorily refused employment were entitled to the *remedy* of senior-

ity adjusted to their date of application for hire (see 424 U.S. at 752). The Supreme Court disagreed with the Court of Appeals's reading of Section 703(h) and held that seniority could, if appropriate, be awarded as of the date of the job application, *as a remedy, if* the prior discriminatory refusal to hire could be proved. The Court arrived at that conclusion in two stages:

First, the Court concluded that Section 703(h) was "only a definitional provision" aimed at "defining what is and what is not an illegal discriminatory practice" if post-Act operation of a seniority system is challenged as perpetuating the effects of pre-Act discrimination (*id.* at pages 758, 761). In other words, as described by Mr. Justice Powell (concurring in at least this aspect of the decision), the Supreme Court held that Section 703(h) insulates "an otherwise bona fide seniority system from a challenge that *it* amounts to a discriminatory practice because it perpetuates the effects of pre-Act discrimination" (*id.* at 781; *cf.* 761; emphasis supplied).*

Second, the Supreme Court held that, since the "*underlying legal wrong*" about which the plaintiffs were complaining was the prior discriminatory refusal to hire and *not* the "alleged operation of a racially discriminatory seniority system," Section 703(h), as the Court had interpreted it, did not prohibit seniority adjustments within the seniority system, *as a matter of remedy*, "once an illegal discriminatory practice occurring after the effective date of the Act is *proved—as in the instant case, a discriminatory refusal to hire*" (*id.* at 758, 762; all emphasis sup-

* It is apparent throughout the *Franks* opinion that when the Court is speaking of a *bona fide* seniority system or of "the existing seniority system" it is speaking of a system, like the TWA-ALPA one in this case, which is non-discriminatory in language and application, was not the result of an intention to discriminate on any prohibited ground, and with respect to which petitioners seek, as here, "an award of the seniority status they would have individually enjoyed under the present system but for the [alleged] discriminatory refusal to hire" (see, *e.g.*, 424 U.S. at 758, 767; *cf.* Mem. 11; A 52; A.Br. 14-15).

plied).* Thus, according to the Supreme Court, the critical factor is the ability to *prove* the prior discriminatory practice (*ibid.*).

Franks considers only the availability of the *remedy* of seniority adjustment. It does not deal directly in any way with the applicability of statutes of limitations to charges of discriminatory refusals to hire. It did not involve and never even considered or offered an opinion as to whether a layoff pursuant to a facially neutral, date-of-hire seniority system would itself be an unlawful employment practice under Title VII if the laid-off individual could no longer, by reason of the statute of limitations, prove the alleged "underlying legal wrong" of unlawful refusal to hire which had delayed his seniority date. In *Franks* the "underlying legal wrong" was still litigable and, once "*proved,*" seniority adjustment was appropriate as a remedy; in *Cates,* litigation of the same "underlying legal wrong" is barred because untimely by several years at best (see pages 9-11, above) and thus, not litigable, can no longer be "proved" as required by *Franks.*

The clear implication of the *Franks* decision is that the operation of any *bona fide* seniority system is not *itself* a violation of Title VII but that *if* a prior substantive Title VII violation can be proven (which plaintiffs by reason of untimeliness cannot) appropriate adjustments in the successful complainant's place within that system may be made to remedy that *prior* violation. Nothing in *Franks* even intimates that routine assignment of actual date of hire seniority in a facially neutral seniority system *itself* constitutes a violation of Title VII or that such routine assignment "perpetuates" an otherwise barred "underlying legal wrong" so as to "unbar" it. Nor does anything in that decision suggest that the existence of a *remedy* for an unbarred claim constitutes a vehicle for reviving a barred one.

* As a matter of fact, the Supreme Court went further and held that "It can hardly be questioned that ordinarily such relief will be necessary to achieve the 'make whole' purposes of the Act" (424 U.S. at 766).

Indeed, the Supreme Court's emphasis upon seniority adjustments as a *remedy* for an "underlying legal wrong" which must be "proved" strongly suggests the contrary.

Thus, *Franks'* view that Section 703(h) of Title VII insulates "an otherwise bona fide seniority system from a challenge that *it* amounts to a discriminatory practice because it perpetuates the effects of pre-Act discrimination" (see page 22, above) and its emphasis upon the centrality of a provable "underlying legal wrong," appear to support TWA's position that once litigation of the "underlying legal wrong" is barred, the operation of the neutral, date-of-hire seniority system, including layoffs thereunder, is not an unlawful employment practice under Title VII despite the fact that an individual subject to that system may have a disadvantageous place therein which he could have remedied had he complained about the "underlying legal wrong" within the statutory time allowed therefor. TWA's conviction to that effect is strengthened by the decision of the Ninth Circuit in *Collins* v. *United Air Lines, supra,* 514 F.2d 594, the Seventh Circuit's first decision in *Evans* v. *United Air Lines, Inc.,* —— F.2d ——, 12 FEP Cases 288 (7th Cir. 1976) ("*Evans I*"), and the Supreme Court's grant of certiorari to review the Seventh Circuit's second decision in *Evans*—*Evans* v. *United Air Lines, Inc.,* 534 F.2d 1247 (7th Cir. 1976) ("*Evans II*").

ii. Collins *v.* United Air Lines

In *Collins,* a stewardess unlawfully terminated because of her marriage failed to file an EEOC charge challenging the legality of her termination within the 90-day Title VII period of limitations (514 F.2d at 595-596). Almost three years later, Collins requested reinstatement with full seniority and back pay (*id.* at 596). When this was denied, Collins filed a charge of sex discrimination with the EEOC claiming that her nonemployment as a stewardess was a continuing violation of Title VII as the result of her prior unlawful termination and that denial of her request for reinstatement constituted a new and separate discrimina-

tory act "or somehow rendered the initial violation, if any, a continuing one" (*ibid.*).

The Ninth Circuit, foreshadowing *Franks* v. *Bowman's* concept of the "underlying legal wrong," affirmed the District Court's dismissal of Collins's claim on the ground that under Title VII "*it is the alleged unlawful act or practice* [*viz.*, the prior unlawful termination]—*not merely its effects—which must have occurred within the 90 days preceding the filing of charges before the EEOC.* Were we to hold otherwise, we would undermine the significance of the Congressionally mandated 90-day limitation period" (*ibid.*; emphasis supplied). This decision, although prior to *Franks*, is entirely consonant with its basic premises of the separation between "underlying legal wrong" and the subsequent routine operation of neutral seniority systems.

iii. Evans I

In *Evans* I, *supra*, —— F.2d ——, 12 FEP Cases 288, the Seventh Circuit followed *Collins* in circumstances where a similarly unlawfully terminated United stewardess failed to challenge her termination within the statutory period but several years later, in 1972, applied for rehire, was accepted, trained, and given seniority in a neutral date-of-hire seniority system as of her actual new date of hire. Eleven months after she had received her new seniority place, Evans filed an EEOC charge of sex discrimination because United would not give her the seniority she had lost by her prior unlawful termination and subsequently brought suit on that charge. United argued that Evans's 1968 termination and her 1972 re-employment were separate and distinct acts and that events connected with the latter should in no way be considered as "continuing" the former. The District Court dismissed her action on the ground that Evans was not suffering from any "continuing violation" but was simply seeking to get back the seniority she had lost "by reason of her February 1968 termination," then barred (see 12 FEP at 298).

The Court of Appeals affirmed, holding that the new seniority assignment was itself a non-discriminatory application of an admittedly non-discriminatory date-of-hire seniority system and that such assignment did not perpetuate the previously barred unlawful termination (*id.* at 290-291). It specifically agreed with *Collins* that "the alleged unlawful act or practice—*not merely its effects*—must have occurred within [the statutory period] preceding the filing of charges" with the EEOC (*ibid.;* emphasis supplied). It also specifically held that "a [seniority] policy which is neutral cannot be said to perpetuate past discrimination in the sense required to constitute *a current violation* of Title VII" and thus her only basis for charging United with discrimination "is the termination in 1968," long since barred as a litigable claim (*id.* at 291; emphasis supplied). Cummings, J., dissented on the ground that United's present denial of past seniority gave "collateral effect to [a] past act of discrimination" which was "the proximate cause of the disparity complained of by plaintiff" (*id.* at 292). Given the discrete nature of the first and second Evans employments, *Evans* I appears clearly correct and fully consonant with the basic premises of *Franks* as described above with respect to *Collins.* See also *Kennedy* v. *Braniff Airways,* —— F. Supp. ——, 13 FEP Cases 1528 (N.D. Texas 1975).

iv. Evans II

However, following the issuance of *Franks* v. *Bowman,* the same Seventh Circuit panel reconsidered *Evans* I and changed its mind (see 534 F.2d 1247 *et seq.*). Briefly, the panel—apparently quite without support in the record—asserted that "United's argument would appear to rest, *sub silentio,* on the protection afforded bona fide seniority systems by section 2000e-2(h)" of Title VII (*id.* at 1249). It then correctly described *Franks* as holding that that Section of Title VII did not preclude a grant of retroactive seniority under a facially neutral seniority system "as a

form of relief'' where the individual complainants ''could prove'' that they had been the actual victims ''of discriminatory hiring practices'' (*id.* at 1249). It went on to state that *Franks* thus ''teaches'' that Section 703(h)—which the court, not United, had brought into the case—could not ''be used to interpose a legal bar to Evans's theory that the perpetuation of past discrimination through United's current seniority policy constitutes a continuing violation of Evans's Title VII rights'' (*id.* at 1250-1251) and then leapt to the conclusion that the routine application of an unexceptionable neutral date-of-hire seniority system to a previously terminated but rehired employee constitutes unlawful ''perpetuation'' of the previous unlawful termination (*ibid.*).

But, as noted at pages 21-24, above, *Franks* ''teaches'' no such things. It teaches only that Section 703(h) simply provides that operation of a facially neutral seniority system is *not* a violation of Title VII merely because it ''perpetuates'' the effects of a pre-Act discrimination and thus it does not prohibit an adjustment of seniority *as a remedy* for an individual who can *prove* he was the victim of a prior ''underlying wrong''—in *Franks*, as in *Cates*, ''a discriminatory refusal to hire'' (see 424 U.S. at 758). By reviving Evans's long-barred claim of prior illegal termination by means of calling the routine operation of a *bona fide* seniority system an unlawful ''perpetuation'' of that previous discrimination, *Evans* II converted the availability of a *remedy* into the substance of a *wrong*.

By this reasoning, the court perverted *Franks* from a salutary vindicator of the Congressional objective of providing ''make whole'' relief for still viable ''underlying legal wrongs'' into an instrument for frustrating the Congressional provision that discrimination charges should be brought and disposed of promptly [see Title VII, §703(g); 42 U.S.C. §2000-2(h)]. It is TWA's view that *Evans* II misinterpreted the thrust and purport of *Franks* v. *Bow-*

man and that the Supreme Court has granted certiorari in order to set the matter right.*

Thus the better reasoned decisions—*Franks, Collins,* and *Evans* I—appear to support TWA's view that operation of a neutral date-of-hire seniority system does ont constitute a violation of Title VII even if its operation involves adverse effects caused by a "wrongful" seniority place which resulted from a prior "underlying legal wrong" which can no longer be litigated.

c. Analogous holdings in the labor field also support TWA's position.

Further support for TWA's position that operation of non-discriminatory seniority systems cannot be challenged after the "underlying legal wrong" is barred from present attack by the statute of limitations is found in holdings of the National Labor Relations Board and the Supreme Court of the United States interpreting the 6-month statute of limitations in the National Labor Relations Act—the equivalent of Title VII's 180-day limitations period [see 29 U.S.C. §160(b); *Bowen Products Corp.*, 113 NLRB 731 (1955); *Local Lodge 1424, I.A.M.* v. *N.L.R.B.*, 362 U.S. 411 (1960)].

In *Bowen*, a laid-off supervisor was recalled to work in the bargaining unit of which he had formerly been a member and was improperly placed at the bottom of the unit's seniority list instead of being credited with seniority for his previous work in the unit (see 113 NLRB at 731). The employee worked in the unit with that seniority from August 24 to October 20, 1953, when he was laid off due to "an economic reduction in force" (*ibid.*). He would not have been laid off had he been properly credited with his

* Interestingly enough, the District Court below relied upon *Collins's* principle that "it is the alleged unlawful act or practice—not merely its effects—which must have occurred within the [statutory] period" in rejecting plaintiffs' "continuing violation" theory and simply cited *Evans* II as holding a contrary view (see Mem. II; A 55, 61).

previous seniority (*ibid.*). On March 26, 1954, the employee filed an unfair labor practice charge challenging his layoff on the ground that it was unlawful because it was the effect of the refusal to accord him his rightful seniority when he entered the bargaining unit in August 1953 (*id.* at 732-733).

The National Labor Relations Board held that the employee's proceeding was not maintainable because it had not been brought within the 6-month limitation period following the assignment of his "wrongful" seniority (*id.* at 732). The Board rejected the Trial Examiner's conclusion that the complaint was timely because the unfair labor practice occurred when the "wrongful" seniority resulted in the employee's *layoff* (*id.* at 731-732). The Board also rejected the employee's argument that the "wrongful place" in the seniority system constituted a "continuing violation" which would avoid the statute of limitations (*id.* at 732). The Board reached these conclusions on the ground that, as in *Cates*, the seniority assignment "was a fully consummated act" at the time it was made, that the employee sustained immediate injury *then* which he could have remedied had he filed charges within the statutory period, and that to allow him to attack his place *now* because "an otherwise proper layoff subsequently resulted" from that wrongful assignment would render the statute of limitations meaningless (*ibid.*; see also *Kennedy* v. *Braniff Airways, supra*, —— F. Supp. ——, 13 FEP Cases 1528).

In enlarging upon that conclusion, the Board made the following statement with respect to the implications of the "continuing violation" theory in seniority situations (*ibid.*):

> "For under this [continuing violation] theory, 10, 20, or more years after the original discrimination, the Complainant, upon being otherwise properly denied a promotion, transfer, recall, vacation benefits, or other rights based on seniority, could maintain an action therefor by establishing the original discrimination

> and relating the subsequent action to it. In our opinion, the Complainant may not establish the now barred claim that he was discriminated against on August 24 as the predicate for his present action seeking redress for his otherwise proper layoff on October 20. We are satisfied that this view comports with the Congressional intent of Section 10(b) to preclude litigating stale unfair labor practices. As noted, the contrary view would require a respondent to collect evidence and find witnesses as to events occurring years before the filing of the charge" [ftnote omitted].

The *Bowen* decision was cited with approval and described in detail by the Supreme Court in *Local Lodge No. 1424, I.A.M.* v. *N.L.R.B., supra*, 362 U.S. at 420, including footnote 12. There, the Supreme Court refused to permit employees to challenge the application to them of a facially valid "union security" clause on the ground that it had been invalid when made because the Union did not then represent a majority of the employees. It held, first, that the challenge was not made until more than the 6-month period of limitations after the execution of the contract containing the objectionable clause and, second, that the continued enforcement of the challenged clause did not constitute a continuing violation which made the challenge timely (*id.* at 420-422). The basis of the Supreme Court's decision was that to permit such a challenge would vitiate the Congressional decision to impose a 6-month statute of limitations which must be implemented "even at the expense of the vindication of statutory rights" (*id.* at 429). In reaching that conclusion the Court flatly asserted that it "is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute" (*ibid.*).

Both *Local Lodge 1424* and *Bowen Products Corp.* are fully applicable here.

d. *Acha* v. *Beame* and other cited cases do not require adoption of the plaintiffs' theory.

Plaintiffs contend that *Acha* v. *Beame*, 531 F.2d 648 (2d Cir. 1976), *Chance* v. *Board of Examiners*, 534 F.2d 993 (2d Cir. 1976), and other cases, including *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652 (2d Cir. 1971), compel acceptance of their position (see, *e.g.*, A. Br. 15, 18, 23). None of these cases involves in any way the issue of timeliness and, in the end, each one of them—insofar as they at all address the problems here presented—is concerned, like *Franks* v. *Bowman*, with "rightful place" in a seniority system as a *remedy* for provable discrimination.

The primary distinction between these cases and *Cates* is that those cases *all* involved allegations of discrimination (in hiring or otherwise) which continued up to the time that charges were filed with the EEOC or suit was brought. Thus the need for the existence of a litigable as well as a provable "underlying" legal wrong before a "rightful place" remedy would be available was never in issue. That distinction is critical to the application of these cases to this appeal—particularly since *Franks* v. *Bowman* came down after *Acha* v. *Beame* and *Chance* v. *Board of Examiners* and represents the first expression of the Supreme Court's view on this issue in the light of which all prior decisions must now be analyzed.*

Acha v. *Beame*, important more because the District Court considered it to support its resolution of the *Cates* complaint than because plaintiffs cite it as an example of "continuing violations" of Title VII, involved a complaint which alleged discrimination against women in appointments as police officers continuing right up to the date the EEOC charges were filed [see *e.g.*, *Acha et al.* v. *Beame*,

* The only post-*Franks* decision of a Court of Appeals of which defendants are aware dealing with this issue is *Evans* II, patently wrong and now before the Supreme Court on writ of certiorari (see pages 26-28, above). Its tenuous authority is evident from the short shrift given it by both plaintiffs and the EEOC as *amicus curiae* in their respective briefs (see A. Br. 19; EEOC Br. 11).

et al., S.D.N.Y. Dkt. No. 75 Civ. 3128, Complaint, ¶21-23, 28(b), 30; *Acha* v. *Beame, supra,* 531 F.2d at 650]. In addition to pre-1973 discrimination, plaintiffs alleged that from 1973 on, all female appointments to the New York police force were discriminatorily made on the basis of a policy of appointing one female for each four males appointed and that males were appointed who had received lower grades than females on the same examinations (*id.* ¶21-23). The EEOC charge was filed June 25, 1975; suit was brought in the Southern District of New York on June 26, 1975 (*id.* at p. 1).*

The immediate relief sought by plaintiffs was the issuance of a preliminary injunction against the layoff of any female police officer in a projected layoff in inverse order of seniority of police officers, male and female, in the police department's facially neutral date-of-hire seniority system. Plaintiffs alleged that the layoff would have a disproportionate effect upon female police officers because they had lower places in that system than they would have had but for the discriminatory hiring practiced against them [*id.* ¶1, 11, 27, 28(a), 32, and p. 1]. The District Court, *sua sponte,* dismissed the complaint on the ground that Sections 703(h) and (j) of Title VII prohibited any interference with layoffs conducted pursuant to a neutral date-of-hire "last in-first out" seniority system [see *Acha* v. *Beame,* 401 F. Supp. 86 (S.D.N.Y. July 1975); *cf., Chance* v. *Board of Examiners, supra,* 534 F.2d 993, 997-998].

In February 1976, a panel of this Court reversed the District Court—stating that "the critical issue" in the litigation was "whether a facially neutral seniority system used to select the employees laid off is necessarily insulated from attack by section 703(h)" (see *Acha* v. *Beame, supra,*

* Thus the EEOC charge was timely as the alleged discriminatory assignment ratio was still extant on that date, and the Section 1983 action was timely upon the same ground and in any event was available because suit was brought less than three years after plaintiffs were allegedly given "wrongful" places in the facially neutral seniority system (see pages 12-15, above, re Section 1981).

531 F.2d 648 at 651). After a review of the cases in this Circuit and elsewhere developing and applying the "rightful place" doctrine, the Court concluded that Section 703(h) did not prohibit adjustment of seniority within neutral date-of-hire seniority systems in appropriate circumstances (see *Acha* v. *Beame, supra, passim*). Concluding its opinion, the Court described its holding in the following terms: "We decide *only* that the layoffs here under section 80 of the Civil Service Law were not insulated from attack by section 703(h) or 703(j) of Title VII, and that those plaintiffs who *can show* that their lack of seniority is the result of past discrimination by defendants are entitled to relief" (*id.* at 656; emphasis supplied).

Acha v. *Beame* is this Circuit's *Franks* v. *Bowman*. It holds, as does *Franks*, that Section 703(h) does not prevent seniority adjustments within a neutral date-of-hire seniority system for previously discriminated-against individuals who can "*prove*" the "underlying legal wrong" which resulted in the individual's being assigned a "wrongful," belated place in that seniority system (compare *Franks* v. *Bowman, supra*, 424 U.S. at 758, 762, with *Acha* v. *Beame, supra*, 531 F.2d at 654, 656). Both decisions recognize the need to be able to "prove" an "underlying legal wrong"—in *Franks* "a discriminatory refusal to hire" (see 424 U.S. at 758, 762), in *Acha* "sexual discrimination" (see 531 F.2d at 654). Both acknowledge that seniority adjustment is a "remedy" for that basic discrimination (see 424 U.S. at 762; 531 F.2d at 656).

But while *Acha* describes the layoff there conducted under the neutral seniority system in terms of its being a violation of Title VII (see 535 F.2d at 654), TWA submits that the Supreme Court in its subsequent decision in *Franks* took a different approach, an approach taken also by another panel of this Court in *Chance* v. *Board of Examiners, supra*, 534 F.2d 993: *viz.*, that the operation of a neutral date-of-hire seniority system is *not* itself a violation of Title VII but that where individuals within that

system can prove that their place should be more advantageous they may be given that relief (see *Franks*: 424 U.S. at 762; *Chance*: 534 F.2d at 998-999, 1004, 1005). To TWA, the latter approach to the possible conflict between the "bona fides" of a neutral seniority system and an individual's "wrongful place" therein is preferable, if not now required by *Franks* v. *Bowman*. First, it maintains the integrity and viability of the Congressional intent expressed in Section 703(h) that "a bona fide seniority system" shall "not be an unlawful employment practice" [see 42 U.S.C. §2000(e)-2(b)]. Second, it avoids the semantic necessity for calling an intrinsically non-discriminatory system which *is bona fide* for all properly placed employees not *"bona fide"* for one improperly placed (see, *e.g., Acha* itself, 531 F.2d at 648). Third, it provides for proper placement in the *bona fide* system for individuals who can fulfill the conditions for such adjustment, *i.e.* who can "prove" the underlying discrimination. It is from that view of *Franks* v. *Bowman* that this Court should now judge the timeliness issue presented by this appeal.*

The Court has long been among the leading exponents of adjusted seniority *as a remedy* for provable—and proven—discrimination (see, *e.g., United States v. Bethlehem Steel Corp., supra,* 446 F.2d 652), but it has been slow to destroy the integrity and stability of genuinely neutral seniority systems by denominating *them* and actions taken thereunder as violations of Title VII (see *Chance* v. *Board of Examiners, supra,* 534 F.2d at 998, 999, 1004-1005). This is the Court's first occasion to consider whether such integrity and stability should be disturbed on the basis of the effects of some alleged discriminatory policy or prac-

* It should, of course, be recognized that an appropriate adjustment in seniority may—but also may not—permit a "wrongfully" placed individual to avoid a layoff under a neutral date-of-hire seniority system. That depends upon whether his "rightful" place will put him above or below the layoff. If below, does the unlawful, allegedly "non-*bona fide*" system and layoff become lawful or was it *bona fide* all along for everybody in it *subject* to adjustment for individuals upon timely proof of unlawful placement in the seniority system?

tice abandoned, if it ever existed, for a period longer than the statute of limitations applicable thereto or some prior alleged "underlying legal wrong" long barred as to the individual plaintiffs (see Mem. II; A 44-45, 46; and pages 9-12, above). The language in *Acha* seized upon by plaintiffs to support their "continuing violation" theory but unnecessary to the decision reached, and indeed not alluded to in the Court's own summary of its holding, should not inhibit this Court from enunciating here a more comprehensive basis for adjustment of seniority within what Congress clearly intended to be considered a lawful "bona fide seniority system", where logic and the practicalities call for such a conclusion, and where the plaintiffs had ample time to litigate their claims within the statutory periods applicable thereto had they then elected to do so.

In dealing with the timeliness issue here presented this Court should follow the analysis and purport of *Franks* v. *Bowman*, *Collins* v. *United Air Lines*, *Evans I*, *Bowen Products Corp.*, and *Local Lodge No. 1424, I.A.M.*, all *supra*, and clearly hold that where an alleged "underlying legal wrong" is barred from prosecution by the failure of the allegedly injured parties to move to challenge that wrong within the applicable period of limitations, the operation of a neutral date-of-hire seniority system does not itself constitute a violation of Title VII, and any lingering effects of that barred "wrong" resulting from the non-discriminatory operation of that *bona fide* seniority system do not continue or revive or substitute for that "wrong" and provide a surrogate vehicle for its prosecution.*

* Since none of the cases cited by plaintiffs—except *Evans* II (see pp. 26-28, *supra*)—involves a barred basic claim and a failure on the part of the injured party to seek seniority relief within the statutory period after the seniority assignment, they are irrelevant and unpersuasive in the premises (see A. Br. 17-19).

The cases cited in the EEOC's brief as *amicus curiae* are irrelevant and unpersuasive for the same reasons. Particularly sterile is the EEOC's argument that plaintiffs' claims should be allowed as "continuing violations" because the difficulty of proving them will generally prevent them from succeeding to the prejudice of those who would be adversely affected by that success (see EEOC Br. 20 *et seq.*).

IV

The purposes designed to be served by the Title VII statute of limitations and other practical and equitable considerations require affirmance of the District Court's conclusion on the grounds urged by TWA.

In its opinion the District Court recognized certain basic principles which are of controlling importance here. First, it acknowledged that the EEOC should only be required "to investigate fresh discriminatory acts" and that considering plaintiffs' claims in this case to be "continuing violations" of Title VII would be contrary to this principle (see Mem. II; A 53). Second, it stated its awareness that calling plaintiffs' claims "continuing violations" would disadvantage their fellow workers "who will necessarily be affected adversely by an award of constructive seniority to others" including the fact that if, at this date, plaintiffs' seniority were changed, some pilots now employed "will lose their jobs" (see Mem. II; A 57).

In addition, the District Court drew particular attention to the fact that adopting plaintiffs' theory of "continuing violation" would "eradicate" Title VII's statute of limitations by permitting plaintiffs to raise seniority issues "any time they chose" (see Mem. II; A 53-54, 56-57). It noted that instability in date-of-hire seniority systems was undesirable since such systems are the foundation upon which employees base their expectations during their employment (Mem. II; A 57). It particularly stated its agreement with the holdings of *Franks* v. *Bowman* and *Collins* v. *United Air Lines, Inc.*, that it is "the underlying legal wrong" which really wronged the plaintiffs—*not* the operation of a neutral, non-discriminatory date-of-hire seniority system nor the later derivative "effects" of that unchallenged "underlying legal wrong" which plaintiffs may some day encounter because of their prior failure to challenge that wrong (see Mem. II; A 52-53). And finally, it

asserted that "strong policy reasons" dictate against holding that an employer who, at some remote time in the past, discriminated on the basis of race or sex, and now applies a neutral seniority system to all employees, is guilty of "committing a continuing violation of Title VII" (Mem. II; A 53, *cf.* 61).

From these unexceptionable observations, the District Court arrived at the following conclusions:

> (1) it will effectuate the Congressional policy of prompt resolution of discrimination claims and the desirable object of stability in seniority systems if employees are "encouraged to bring their actions promptly, in order to resolve the difficult issue of constructive seniority in an expeditious manner" (Mem. II; A 57-58);
>
> (2) adopting plaintiffs' "continuing violation" theory will frustrate that objective (Mem. II; A 53);
>
> (3) but requiring a plaintiff to challenge his place in the seniority system when it is assigned to him will require the EEOC to investigate "frivolous" and "premature" charges of past discrimination because the plaintiff will not then know "what the company had done to him" nor what damage he would suffer (see Mem. II; A 49);
>
> (4) the damage suffered by a plaintiff prior to layoff is not sufficient to justify requiring him to bring suit within any given time after being assigned his "wrongful place" in the seniority system nor does such damage constitute discriminatory acts sufficient to support an action (see Mem. II; A 54, 60-61, *cf.* 56);
>
> (5) therefore, although there has been no actionable discrimination between hire and layoff, at the time of layoff an actionable discrimination occurs and an EEOC charge must be filed within 180 days thereafter (or a Section 1981 action brought within three years of that date) or plaintiffs are barred from contesting

their layoff—let alone their place in the seniority system (see Mem. II; A 54-55, 56, 68); and

(6) if an employee is *not* laid off, he has no right to challenge his allegedly "wrongful place" in the seniority system (see Mem. II; A 59-61).

The last four of these conclusions, however, are not consonant with the authorities and principles accepted by the District Court and do not effectuate the ends which the District Court correctly believes should be accomplished.

First, they do not encourage employees who believe they have a "wrongful place" in their company's seniority system "to bring their actions promptly, in order to resolve the difficult issue of constructive seniority in an expeditious manner" (see Mem. II; A 57-58). Instead, the District Court's conclusions postpone any such action until an employee is, if ever, laid off—thus requiring that employee to suffer the adverse effects of his alleged "wrongful place" without recourse until layoff and encouraging his fellow employees to believe their place in the system is secure until they suddenly discover that it has all along been wrong and that *they* are subject to layoff (see Mem. II; A 57).

Second, they make the "effects" of a prior barred "underlying legal wrong" rather than the "underlying legal wrong" itself the operative act in clear opposition to *Franks* v. *Bowman* and *Collins* v. *United Air Lines, Inc.*, which the District Court ostensibly approves (see Mem. II; A 52-53, 55-56, 61).

Third, the District Court's solution does not effectuate the statutory period of limitations mandated by Congress because, by substituting an ephemeral date-of-layoff as the start of the statutory period for the statute's 180 days after the "underlying legal wrong," it postpones into the indefinite future any litigation about the "wrongfulness" of an employee's place in a perfectly appropriate and non-

discriminatory system, *i.e.*, to a time when no evidence and no witnesses may even be available properly to resolve the claim when eventually made.

And, finally, the District Court's choice of the date of layoff as the operative date of an alleged new discrimination in effect makes an employer who is non-discriminatorily operating a neutral seniority system "guilty of committing a continuing violation of Title VII" despite the "strong policy reasons" which the District Court believed "dictate against" such a result (see Mem. II; A 53).

But the facts and logic of this case require no such results. Rather, they require the dismissal of the complaint herein on the grounds urged by defendants upon the District Court. There are two—and only two—possible unlawful discriminations in this case:

> (1) an alleged unlawful refusal to hire ~~plaintiffs~~ because of their race and
>
> (2) an assignment to them, upon hire, of a "wrongful place" in TWA's wholly non-discriminatory date-of-hire seniority system based upon their alleged belated date of hire.

Nothing that happened to plaintiffs after their hire and their assignment of a seniority number has been discriminatory in the slightest degree. They have simply been treated—like every other TWA pilot of whatever race or color—according to the date-of-hire terms of the collective bargaining agreement applicable to them all. And Congress has specifically provided in Section 703(h) of Title VII that the operation of a *bona fide* seniority system "not the result of an intention to discriminate" shall not be an unlawful employment practice [see 42 U.S.C. §2000e-2(h)].

Moreover, Congress has specified that any charge of discrimination shall be filed with the EEOC within 180 days of the alleged discriminatory act [42 U.S.C. §2000e-

2(e)]. It has long been recognized that the purpose of Title VII's relatively short statute of limitations is to require the prompt filing and resolution of charges of discrimination in order to serve everyone's valid "interests in prohibiting the prosecution of stale [claims]" [see, *e.g.*, *Johnson* v. *Railway Express Agency, supra,* 421 U.S. 454, 464; *Hecht* v. *Cooperative for American Relief Everywhere,* 351 F. Supp. 305, 310 (S.D.N.Y. 1972)]. That Congress intended and still intends to put a sharp limit upon the period within which an aggrieved person can prosecute a discrimination claim or be forever barred therefrom is established by the fact that when Congress in 1972 first revised Title VII it extended the period within which discrimination charges must be filed from 90 to 180 days, but it did not abolish it [compare 78 Stat. 241 (1964) with 86 Stat. 103 (1972)]. As the Supreme Court said in *Local Lodge No. 1424, I.A.M.* v. *N.L.R.B., supra,* 362 U.S. 411, it is not for even the Supreme Court to justify the policy of Congress; it is enough that a court finds the limitation in the statute (see 362 U.S. at 429).

The prompt filing of Title VII claims not only facilitates effective investigation of the alleged discrimination while memories are still fresh and witnesses and evidence current and available but also encourages prompt disposition of the alleged discrimination with consequent stabilization of the employment situation involved in the complaint to the advantage of the complainant, the challenged employer, and his other employees [see *Local Lodge No. 1424, I.A.M.* v. *N.L.R.B., supra,* 362 U.S. 411, 419, 429; *Bowen Products Corp., supra,* 113 NLRB 731, 733]. Such stabilization is particularly important with respect to challenges to seniority—which affect employees throughout their employment and on which employees rely in gauging their future employment opportunities and possible liabilities [see *Franks* v. *Bowman, supra,* 424 U.S. at 766-767; *Acha* v. *Beame, supra,* 531 F.2d 648, 656 (need to minimize disruption)].

To effectuate that Congressional objective in cases involving claims of "wrongful place" in a seniority system the latest logical—and rational—time to require a claimant to file his claim of "wrongful place" is the time when he is assigned his place in that seniority system [see *Kennedy* v. *Braniff Airways*, —— F.Supp. ——, 13 FEP Cases 1528, 1529 (N.D. Texas 1975); *Bowen Products Corp., supra*, 113 NLRB 731, 732]. As set forth in the footnote on page 19, above, the putative plaintiff cannot help but know at that time "what the company had done to him" (see Mem. II; A 49), since the only possible basis of his claim is that the company unlawfully refused to hire him at some prior time, and within 180 days at the latest he must know the damages he will suffer from that allegedly "wrongful place," since the seniority system admittedly governs every important aspect of his employment [*ibid.*; see also SAC ¶9(c), (d); A 32-33].

What more appropriate time could there be to settle the correctness of an employee's placement in a seniority system in which he and all of his fellow employees have a vital and continuing interest and investment than the period of limitations immediately succeeding his assignment to a place therein (see *Kennedy* v. *Braniff Airways, supra*, 13 FEP Cases 1528; *Bowen Products Corp., supra*, 113 NLRB 731)? In so holding, the Congressional purpose of prompt adjudication of claims of discrimination would be totally fulfilled with complete protection for putative plaintiffs as well as expeditious settlement of seniority challenges to the integrity of the seniority system upon which all other employees rely (see *Franks* v. *Bowman, supra*, 424 U.S. at 766).

Any later point for commencing the period of limitations not only abrogates the Congressional intent embodied therein but also has other illogical and undesirable results:

First, it illogically—and ironically—accords to employees who are fortunate enough to be hired after the expiration of the statutory period within which they may complain of an unlawful prior refusal to hire them greater

rights to litigate the legality of that previous refusal to hire than are accorded to less fortunate employees identically refused hire but thereafter never hired—the latter being clearly restricted to the statutory 180-day limitations period (see page 10, above; Mem. II; A 54). This is not only grossly unfair and entirely unsupportable as a legal position; it is also almost guaranteed to discourage employers from hiring applicants formerly refused hire more than 180 days after that refusal where there is any possibility that such applicants may consider the prior refusal to be tainted by unlawful discrimination. Such a result is clearly not in the interest of the employer, job applicants, or the general public.

Second, it leaves unsettled for an indefinite but apparently unlimited period the correctness and reliability of the seniority order governing the most essential aspects of the business lives of all employees covered by neutral date-of-hire seniority systems. Any newly hired employee given, like every other new hire, seniority from his actual date of hire may thereafter, if laid off at any time throughout his employment, challenge the propriety of his perhaps long-standing seniority within 180 days following any layoff on the basis of a prior allegedly discriminatory refusal to hire, now long in the past, and, if successful, force a rearrangement of the seniority order on which his fellow employees had up to then reasonably relied for their future. What appropriate public policy is served by permitting the existence of such an open-ended disruptive right when the challenge, if any properly existed, could have been exercised—and settled—at the time of the assignment of the seniority?

Moreover, permitting an employee the unlimited right to challenge upon his layoff the alleged discriminatory nature of an act which, though legally remote in time, adversely affected his place in a neutral date-of-hire seniority system subjects, without any rational justification, his employer to liability of unknown, and indeed unknowable, extent resulting from future claims of unlawful placement in seniority systems, which claims, under the District Court's

holding, may remain latent but alive throughout the claimant's employment subject to assertion after a layoff many years hence (see *Bowen Products Corp., supra,* 113 NLRB at 732). Here again, what appropriate public policy is served by such result when a more rational, definitive time for requiring such challenges to be made is obviously in order?

Conclusion

Congress has directed that charges of unlawful discrimination must be made within 180 days of the occurrence of the act complained of and that application of a *bona fide* seniority system shall not constitute "an unlawful employment practice" under Title VII. While there has heretofore been some confusion among the courts as to how to reconcile these directives in circumstances where plaintiffs claim that prior discrimination has resulted in their having a disadvantageous place in a neutral date-of-hire seniority system, the Supreme Court in *Franks* v. *Bowman* has now clearly indicated that it considers such systems to be *bona fide* under the statute and that rectification of an individual's place within such a system is a "remedy" which depends upon the individual's ability to "prove" that his place in the system is the result of some "underlying legal wrong" such as a prior unlawful refusal to hire. Since plaintiffs, by virtue of the statute of limitations, are unable to fulfill that condition, their complaints were properly dismissed.

This appeal presents this Court with the opportunity to reconcile those two Congressional objectives by holding —as logic requires—that a challenge to one's place in a neutral, date-of-hire seniority system must be made, if at all, within the statutory period of limitations following the assignment of that place. Such a holding will effectuate the Congressional purpose in enacting the limitation period, will adequately protect employees' right to mount such challenges while ensuring the least disruptive effect upon the rights of those already employed, and will settle

once and for all the manner and time within which such challenges must be made.*

Each of the plaintiffs failed to challenge his alleged unlawful refusal to hire within the Title VII and the Section 1981 statutes of limitations after the said refusal or, at the latest, after their respective actual dates of hire. Each of the plaintiffs also failed to challenge his alleged unlawful place in TWA's neutral date-of-hire seniority system within the Title VII and the Section 1981 statutes of limitations after the assignment of their respective places in that neutral date-of-hire seniority system. Accordingly, their discrimination claims under both Title VII and Section 1981 are barred as untimely.

On those grounds, and for the reasons above set forth, the order of the District Court dismissing the Second Amended Complaint in its entirety should be affirmed.

Dated: New York, New York
December 28, 1976

Respectfully submitted,

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* The recent decisions of *Kennan* v. *Pan American World Airways, Inc.*, —— F.Supp. ——, 13 FEP Cases 1530 (N.D. Cal. Nov. 22, 1976), and *Turnow* v. *Eastern Air Lines*, —— F.Supp. ——, 13 FEP Cases 1227 (D.N.J., Sept. 28, 1976), illustrate the necessity for definitive appellate reasoning and guidance in this increasingly important area. *Cf. Kennedy* v. *Braniff Airways, supra*, —— F.Supp. ——, 13 FEP Cases 1528.

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